No. 94-1256

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In The

Supreme Court of the United States

October Term, 1994

CITY OF EDGERTON, AND EDGERTON SAND & GRAVEL, INC.,

Plaintiffs-Respondents-Petitioners,

v.

GENERAL CASUALTY COMPANY OF WISCONSIN,

Defendant-Appellant-Respondent,

WISCONSIN INSURANCE SECURITY FUND,

Defendant,

AETNA CASUALTY & SURETY COMPANY,

Defendant-Co-Appellant-Respondent,

HANOVER INSURANCE COMPANIES, WAUSAU INSURANCE COMPANIES, AND LOCAL GOVERNMENT PROPERTY INSURANCE FUND,

Defendants.

On Petition for Writ of Certiorari to the Supreme Court of the State of Wisconsin

BRIEF IN OPPOSITION FOR RESPONDENT GENERAL CASUALTY COMPANY OF WISCONSIN

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QUESTION PRESENTED

Whether the Wisconsin Supreme Court correctly determined, following Wisconsin principles of insurance contract interpretation, that the term "damages," as used in the insurance context, does not include response costs under CERCLA or equivalent Wisconsin state statutes?

STATEMENT PURSUANT TO RULE 29.1

Respondent General Casualty Company of Wisconsin is a corporation organized under the laws of the State of Wisconsin and is owned by Winterthur U.S. Holdings. Winterthur U.S. Holdings is a Delaware Corporation wholly owned by Winterthur Swiss Insurance Company, a Swiss Company.

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On Petition for Writ of Certiorari to the Supreme Court of the State of Wisconsin

BRIEF IN OPPOSITION FOR RESPONDENT GENERAL CASUALTY COMPANY OF WISCONSIN

Respondent General Casualty Company of Wisconsin (General Casualty) respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the judgment and opinion of the Supreme Court of the State of Wisconsin.

STATEMENT OF THE CASE

This case involves an issue concerning insurance coverage for environmental response costs.[1] It requires the interpretation of insurance contracts issued by General Casualty to Edgerton Sand & Gravel, Inc. (ES&G) and the City of Edgerton (the City) under Wisconsin law.[2]

The insuring agreement contained in the General Casualty policies provides:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay *as damages* because of
>
> A. bodily injury or
>
> B. property damage
>
> to which this insurance applies, caused by an

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1. Pursuant to Supreme Court Rule 15.1, General Casualty objects to the Petitioners' statement of the case to the extent the Petitioners rely upon disputed facts or facts not in the record. However, because the issue in this case involves an issue of insurance contract interpretation, the underlying facts contained in the Petitioners' statement of the case are not relevant.

2. Respondent Aetna Casualty & Surety Company also issued policies of insurance to ES&G.

> occurrence, and the company shall have the right and duty to defend *any suit against the insured seeking damages. . . .*

(Pet. App. 119) (emphasis added).

On December 29, 1990, ES&G and the City commenced a state court action in Rock County Circuit Court seeking a declaration that the comprehensive general liability (CGL) policies issued by General Casualty provided coverage for response costs associated with the Edgerton Landfill. The parties sought the state court's interpretation of a variety of policy provisions including the provision requiring that there be a "suit against the insured seeking damages."

Although it was undisputed that a lawsuit seeking damages had not been commenced against ES&G or the City, ES&G and the City claimed that letters they received from the government were the "functional equivalent" of a lawsuit and that response costs were "damages" within the meaning of the insurance policy. General Casualty maintained that, under Wisconsin law, a "suit" requires a court proceeding and response costs are equitable in nature and therefore not legal damages.

Relying on Wisconsin law, the Wisconsin Supreme Court determined that the term "suit" as used in insurance policies, was unambiguous. Quoting a case decided earlier in the term, the court stated:

> [I]n *State v. P.G. Miron Const. Co., Inc.*, 181 Wis. 2d 1045, 512 N.W. 2d 499 (1994), . . . we defined "suit" as
>
> > "any proceeding by one person or persons against another or others in a

> court of law in which the plaintiff pursues, in such court, the remedy which the law affords him for the redress of an injury or the enforcement of a right, whether at law or equity."

(Pet. App. 125) (emphasis in the original). Thus, following Wisconsin law, the Wisconsin Supreme Court determined that the term "suit" requires an actual court proceeding and letters from a governmental agency did not constitute a "suit."

Next, the court turned to the issue of "damages." Again, relying on Wisconsin precedent, the court determined that the term "damages," as used in insurance policies, is well-defined in Wisconsin. *Quoting Shorewood School District v. Wausau Insurance Companies*, 170 Wis. 2d 347, 368, 488 N.W. 2d 88, 89 (1992), the court stated that, in Wisconsin, the term " ' '[d]amages' as used in . . . insurance policies unambiguously means legal damages.' " (Pet. App. 136). Since response costs under CERCLA and equivalent Wisconsin state statutes[3] are equitable in nature, they do not constitute "damages." Consequently, no suit had been commenced against ES&G and the City seeking damages and the court determined General Casualty was entitled to summary judgment.

ES&G and the City filed a motion requesting the Wisconsin Supreme Court reconsider its decision concerning both the "suit" and "damages" issues. The motion was denied on October 25, 1994. ES&G and the City now petition for writ of certiorari seeking only a review of the "damages" issue.

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3. It is important to note that although the Wisconsin Supreme Court used the CERCLA statutory scheme as a guide, the cleanup in the underlying matter was performed pursuant to Wisconsin state statutes and not CERCLA. (Pet. App. 108-111).

SUMMARY OF THE ARGUMENT

No reason exists for the grant of certiorari. This case involves a state law question of insurance contract interpretation. This Court has rejected virtually identical petitions raising the same arguments on five prior occasions.[4] ES&G and the City have failed to provide any reason to treat this petition differently.

This case involves a state law issue since it concerns a question of insurance contract interpretation. The interpretation of Wisconsin insurance law is far removed from the role of this Court. In an attempt to create a federal issue, ES&G and the City claim review is necessary under Supreme Court Rule 10.1(b) because there is a conflict among the United States courts of appeal and state courts of last resort. However, this conflict is "merely corollary to a permissible difference of opinion in the state courts." *Ruhlin v. New York Life Insurance Company*, 304 U.S. 202, 206 (1938). This is not a sufficient reason to grant certiorari. *Id.*

ES&G and the City also claim review is necessary under Supreme Court Rule 10.1(c) because the Wisconsin Supreme Court decision purportedly conflicts with decisions of this Court and a federal statute. As noted above, this is a state issue

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4. *See Gerrish Corp. v. Universal Underwriters Ins. Co.*, 947 F.2d 1023 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 2939 (1992); *Independent Petrochemical Corp. v. Aetna Casualty & Surety Company*, 944 F.2d 940 (D.C. Cir. 1991), *cert. denied sub nom., Certain Underwriters at Lloyd's London v. Independent Petrochemical Corp.*, 112 S. Ct. 1777 (1992); *Avondale Indus. v. Travelers Indem. Co.*, 887 F.2d 1200 (2d Cir. 1989), *rehearing denied*, 894 F.2d 498 (1990), *cert. denied*, 496 U.S. 906 (1990); *Continental Ins. Co. v. Northeastern Pharmaceutical & Chemical Co.*, 842 F.2d 977 (8th Cir.) (en banc), *cert. denied sub nom., Missouri v. Continental Ins. Companies*, 488 U.S. 821 (1988); *Maryland Cas. Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988).

involving Wisconsin insurance contract interpretation. However, even if this issue could somehow be transformed into a federal issue, the Wisconsin Supreme Court decision is entirely consistent with federal law.

Finally, ES&G and the City call for a national uniform rule obliterating insurance contract terms and superseding state law principles of insurance contract interpretation. Such a radical measure would be directly contrary to federal decisions and CERCLA itself.

REASONS FOR DENYING THE WRIT

I.

THE INTERPRETATION OF A COMPREHENSIVE GENERAL LIABILITY POLICY BY A STATE'S HIGHEST COURT IS NOT AN ISSUE WARRANTING CERTIORARI.

ES&G and the City claim review is necessary under Supreme Court Rule 10.1(b) because there is a split among United States courts of appeal and state courts of last resort concerning whether response costs constitute "damages." Review under Supreme Court Rule 10.1(b) is only appropriate or necessary when the conflict involves a federal question. This case presents a state law question of insurance contract interpretation. It involves issues of state law, not federal law, and does not warrant certiorari.

The issue is not (as ES&G and the City now contend) whether monies paid pursuant to CERCLA constitute damages as defined by this and other federal courts. Rather, the issue is whether, under Wisconsin law, response costs constitute "damages" as that term is used in CGL policies.

It is well established that interpretation of an insurance policy is governed by state law.[5] ES&G and the City both concede this. (Pet. at 16). However, they attempt to create a federal law issue by claiming that this matter is controlled by CERCLA. (Pet. at 16). Courts have uniformly rejected this argument holding that state law applies in insurance coverage cases involving CERCLA.[6] Because the interpretation of insurance policies is a matter of state law, this Court has consistently denied review of insurance coverage disputes including those involving CERCLA.[7] In fact, this Court has denied certiorari in at least five

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5. *See, e.g., Interco Inc. v. National Sur. Corp.*, 900 F.2d 1264, 1266 (8th Cir. 1990); *Provau v. State Farm Mut. Auto Ins. Co.*, 772 F.2d 817, 819 (11th Cir. 1985); *Nationwide Mut. Fire Ins. Co. v. Fleming*, 750 F. Supp. 996, 999 (E.D. Mo. 1990); *Alfin, Inc. v. Pacific Ins. Co.*, 735 F. Supp. 115, 118 (S.D.N.Y. 1990).

6. *See American Policyholders Ins. Co. v. Nyacol Products, Inc.*, 989 F.2d 1256, 1263 (1st Cir. 1993), *cert. denied*, 114 S. Ct. 682 (1994)("[t]he massed authority for treating insurance coverage questions in CERCLA cases as peculiarly matters of state law pervades the court of appeals"); *see also Aetna Cas. & Sur. Co. v. General Dynamics Corp.*, 968 F.2d 707, 712-13 (8th Cir. 1992); *Northern Ins. Co. of New York v. Aardvark Assoc., Inc.*, 942 F.2d 189, 192 (3d Cir. 1991); *Industrial Indem. Ins. Co. v. Crown Auto Dealership, Inc.*, 935 F.2d 240, 241 (11th Cir. 1991); *FL Aerospace v. Aetna Cas. & Sur. Co.*, 897 F.2d 214, 217 (6th Cir. 1990), *cert. denied*, 498 U.S. 911 (1990); *A. Johnson & Co. v. Aetna Cas. & Sur. Co.*, 741 F. Supp. 298, 300 (D. Mass. 1990), *aff'd*, 933 F.2d 66 (1st Cir. 1991); *Hazen Paper Co. v. U.S.F.& G.*, 407 Mass. 689, 555 N.E. 2d 576, 583 (1990).

7. *See, e.g., Broderick Ins. Co. v. Hartford Acc. & Indem. Co.*, 954 F.2d 601 (10th Cir.), *cert. denied*, 113 S. Ct. 189 (1992); *Lumbermens Mut. Cas. Co. v. Belleville Industries, Inc.*, 938 F.2d 1423 (1991), *cert. denied*, 502 U.S. 1073 (1992); FL *Aerospace*, 897 F.2d 214; *Eli Lilly & Co. v. Home Ins. Co.*, 794 F.2d 710 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1060 (1987); *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983); *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982).

cases involving the identical insurance coverage issue presented here.[8]

Moreover, this "split" has not developed because courts interpret CERCLA differently. It is because individual states have defined the term "damages," for insurance purposes, differently. In the cases addressing the "damages" issue, courts (both state and federal) define the term "damages" under the applicable state's rules of insurance contract interpretation. In states where the controlling state law defines the term "damages" as "legal damages," courts have held response costs are not covered by CGL policies.[9] In states where the controlling state law contrues the term "damages" broadly or finds it ambiguous,

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8. *See Gerrish Corp. v. Universal Underwriters Ins. Co.*, 947 F.2d 1023 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 2939 (1992); *Independent Petrochemical Corp. v. Aetna Casualty & Surety Company*, 944 F.2d 940 (D.C. Cir. 1991), *cert. denied sub nom., Certain Underwriters at Lloyd's London v. Independent Petrochemical Corp.*, 112 S. Ct. 1777 (1992); *Avondale Indus. v. Travelers Indem. Co.*, 887 F.2d 1200 (2d Cir. 1989), *rehearing denied*, 894 F.2d 498 (1990), *cert. denied*, 496 U.S. 906 (1990); *Continental Ins. Co. v. Northeastern Pharmaceutical & Chemical Co.*, 842 F.2d 977 (8th Cir.) (en banc), *cert. denied sub nom., Missouri v. Continental Ins. Companies*, 488 U.S. 821 (1988); *Maryland Cas. Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988).

9. *See, e.g., Grisham v. Commercial Union Ins. Co.*, 951 F.2d 872, 875 (8th Cir. 1991) (Arkansas defines "damages," as used in the insurance policy, as legal damages); *Parker Solvents Co. v. Royal Ins. Companies of America*, 950 F.2d 571, 572 (8th Cir. 1991) (same); *Cincinnati Ins. Co. v. Milliken & Co.*, 857 F.2d 979, 981 (4th Cir. 1988) (applying South Carolina law, "damages" means legal damages); *Northeastern Pharmaceutical & Chemical Co.*, 842 F.2d at 985 (following Missouri law, "damages" refers to legal damages); *Armco, Inc.*, 822 F.2d at 1351 (Maryland has adopted a narrow, technical definition of "damages" requiring legal damages).

the courts hold that the term "damages" includes equitable relief such as response costs.[10]

Even ES&G and the City's own authority explains that the difference between the holdings is a result of varying state law rather than a conflict with federal law. In *Independent Petrochemical Corporation*, the United States Court of Appeals for the District of Columbia stated:

> Our research reveals that, with the exception of NEPACCO, in every case in which the operative state's rules of insurance contract interpretation required — as Missouri's does — resort to the common and ordinary understanding of language, the word "damages" has been construed to cover reimbursement for environmental response costs incurred by a government. . . . Decisions construing the term differently were apparently governed by state rules of interpretation under which the technical or legal meanings of language controlled.

944 F.2d at 946. This Court denied certiorari of *Independent Petrochemical Corporation*. *See* 112 S. Ct. 1777.

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10. *See, e.g., Gerrish Corp.*, 947 F.2d at 1029-31 (under Vermont law, "damages" has a broad meaning); *Independent Petrochemical Corp.*, 944 F.2d at 946 (disagreeing with NEPACCO and determining application of Missouri law requires a broad interpretation of the term "damages"); *Avondale Indus., Inc.*, 887 F.2d at 1207 (Louisiana defines damages broadly); *Hazen Paper Co.*, 407 Mass. at 699, 555 N.E. 2d at 583 ("damages" is ambiguous under Massachusetts law); *Minnesota Mining & Mfg. Co. v. Travelers Indem. Co.*, 457 N.W. 2d 175, 179 (Minn. 1990) (under Minnesota law, the term "damages" is ambiguous).

This Court has long held that a conflict among courts on issues involving state law is not sufficient reason for granting certiorari. *Ruhlin*, 304 U.S. at 206 (certiorari should be denied when the conflict was "merely corollary to a permissible difference of opinion in the state courts"). Because the split of authority is not based on federal law but arises solely as a result of individual states applying their own principles of insurance contract interpretation, review is not warranted.

II.

THE WISCONSIN SUPREME COURT DECISION IS CONSISTENT WITH DECISIONS OF THIS COURT AND THE STATUTORY SCHEME OF CERCLA.

In an attempt to circumvent the Court's traditional refusal to review state law issues, ES&G and the City claim the Wisconsin Supreme Court's characterization of response costs as equitable relief conflicts with decisions of this Court. (Pet. at 17). ES&G and the City are wrong. A review of the applicable cases demonstrates the Wisconsin Supreme Court's decision is entirely consistent with federal court decisions and CERCLA itself.

Following Wisconsin precedent, the Wisconsin Supreme Court determined the term "damages," as used in CGL policies, unambiguously means legal damages. Legal damages "compensate for wrongs or injuries that [are] generally pecuniary in nature." (Pet. App. 136). Damages, under Wisconsin insurance law, are a form of substitutionary relief; that is, they give the injured party money to make up for the claimed loss. *Shorewood*, 170 Wis. 2d at 369, 488 N.W. 2d at 89. They do not encompass restitutionary or injunctive relief which is designed to "give the plaintiff the very thing to which he was entitled." *Shorewood*, 170 Wis. 2d at 369, 488 N.W. 2d at 89. Thus, in Wisconsin, the term "damages," as used in insurance policies, includes only legal

damages and does not include equitable monetary relief. (Pet. App. 136).

Following these Wisconsin principles, the Wisconsin Supreme Court determined response costs under 42 U.S.C. § 9607(a)(4)(A), 42 U.S.C. § 9607(a)(4)(B) and equivalent Wisconsin state statutes are equitable in nature, unlike damages for the injury, destruction or loss of natural resources under 42 U.S.C. § 9607(a)(4)(C). A review of the statutory scheme itself demonstrates response costs actions under CERCLA or equivalent Wisconsin state statutes are, by definition, equitable actions invoking injunctive and restitutionary relief. Under CERCLA, costs may be imposed upon responsible parties under § 9606 or § 9607. Section 9606 creates a cause of action for *injunctive relief* for abatement. Under this section, the government may force a responsible party to perform a cleanup under the mandate of a federal injunction. Section 9607(a) creates causes of action which:

1. Allow the government to sue for reimbursement of response costs (§ 9607(a)(4)(A));

2. Allow private parties to sue for response costs (§ 9607(a)(4)(B));

3. Allow the government to sue for *damages* for injury, destruction or loss of natural resources. § 9607(a)(4)(C).

Thus, §§ 9607(a)(4)(A) and 9607(a)(4)(B) create a cause of action for response costs. Only § 9607(a)(4)(C) creates a cause of action for damages.

Not only does CERCLA expressly distinguish between

response costs and damages for harm to natural resources, the distinction between the two forms of relief has been well defined by federal courts interpreting CERCLA. Federal courts have consistently held response costs actions under CERCLA are equitable actions invoking injunctive and restitutionary relief and do not constitute actions for legal damages.[11] However, federal courts interpreting claims for natural resource damages have determined those claims are compensatory in nature and are distinct from response costs. *See In re Acushnet River & New Bedford Harbor Proceedings*, 712 F. Supp. 994 (D. Mass. 1989).

A review of the Final Rule demonstrates that the government recognizes claims for natural resource damages are compensatory in nature and are distinct from response costs which are considered equitable. According to the Final Rule promulgated by the Department of Interior:

> *CERCLA authorize[s] natural resource trustees to recover compensatory damages* for injury to, destruction of, or losses of natural resources resulting from . . . a release of a hazardous substance.
>
> * * *
>
> *Damages may be recovered for those natural*

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11. *See, e.g., American Cyanamid Co. v. King Industries, Inc.*, 814 F. Supp. 209, 213-14 (D.R.I. 1993) (courts have uniformly held there is no right to a jury trial in a CERCLA action because a "CERCLA action to recover response costs is equitable in nature" and is not an action for "legal damages"); *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 749 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); *United States v. Mexico Feed & Seed Co.*, 729 F. Supp. 1250, 1254 (E.D. Mo. 1990); *United States v. Northernaire Plating Co.*, 685 F. Supp. 1410, 1413 (W.D. Mich. 1988), *affirmed sub nom., United States v. R.W. Meyer, Inc.*, 889 F.2d 1497 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990).

> *resource injuries and losses that are not fully remedied by response actions. All sums recovered in compensation for natural resource injuries must be used to restore, rehabilitate, replace, or acquire the equivalent of the injured natural resources.*

Final Rule 59 Fed. Reg. 14262, 14262 (Mar. 25, 1994) (emphasis added).

The portion of the administrative regulation cited by ES&G and the City belies their point. (*See* Pet. at 14). They claim that because the measure of damages for natural resource damage claims includes the cost of restoring, rehabilitating, replacing and/or acquisition of the equivalent of the injured natural resources, natural resource damages and response costs are the same. Their argument ignores the fact that damages may only be recovered for those natural resource injuries and losses not fully remediated by response actions. Final Rule, 59 Fed. Reg. at 14262; *see also,* 42 U.S.C. § 9607(f)(1) (forbidding double recovery for response costs and natural resource damages). In other words, the government, in natural resource damage actions, is awarded damages to compensate for the injuries to the natural resources which cannot be restored or remediated. Thus, consistent with the Wisconsin Supreme Court decision, the administrative regulations also recognize the compensatory nature of natural resource damage claims in contrast to the equitable nature of response costs.

ES&G and the City's argument that the Wisconsin Supreme Court's decision is in conflict with decisions of this Court also fails. This Court has never held that response costs constitute legal damages. ES&G and the City's reliance upon *Key Tronic Corp. v. United States*, 114 S. Ct. 1960 (1994) and *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) is misplaced.

In *Key Tronic Corp.*, a case involving a contribution claim under 42 U.S.C. § 9613(f), this Court narrowly defined the issue as "whether attorney's fees are 'necessary costs of response' within the meaning of § 107(a)(4)(B)." *Key Tronic*, 114 S. Ct. at 1962. In limiting itself to this issue, the Court determined that attorney fees incurred in pursuing litigation were not recoverable under the American Rule. *Key Tronic*, 114 S. Ct. at 1967. Nowhere in *Key Tronic* does this Court hold response costs constitute "legal damages." That simply was not an issue in the case. In fact, the word "damages" does not even appear in the decision.

ES&G and the City claim that the *Key Tronic* decision "treats" response costs as damages by recognizing an implied right of contribution which Congress made explicit by amendment in 1986. (Pet. at 12). However, mere authorization by Congress of a cost recovery or contribution claim for response costs does not, *ipso facto*, turn response costs into legal damages.

Prior to 1986, the right to contribution under CERCLA was implied under 42 U.S.C. § 9607. In 1986, Congress passed 42 U.S.C. § 9613(f) which provides an express right to contribution. The Congressional intent of allowing the enactment of § 9613(f) emphasizes the equitable nature of contribution and the policy reasons surrounding its enactment. According to the House Report:

> This section clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup costs that may be greater then its equitable share under the circumstances. . . .

H.R. Rep. No. 253 (I), 99th Cong., 1st sess. 1, 80 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2861-62. Nowhere in the statute's legislative history reports did Congress reveal an intent to treat response costs as legal damages. Rather, the intent was simply to incorporate fairness into the statutory scheme. This was confirmed in *Transtech Industries, Inc. v. A&Z Septic Clean*, 798 F. Supp. 1079, 1086 (D.N.J. 1992), *cert. denied sub nom., Mayco Oil & Chemical Co. v. Transtech Industries, Inc.*, 114 S. Ct. 2692 (1994) (purpose for enactment is to allow PRPs to "gain reimbursement for their cleanup expenditures from other PRPs").

Contribution under CERCLA is simply a statutory mechanism created by Congress allowing a party that has paid more than its fair share to be reimbursed. Thus, recognition of an implied right of contribution for response costs which Congress made explicit by amendment in 1986 does not transform response costs into legal damages and *Key Tronic* is inapplicable.

ES&G and the City's reliance on *Pennsylvania v. Union Gas Company* is equally misplaced. The issue addressed in *Union Gas* was whether states are immune under the Eleventh Amendment from contribution actions under CERCLA. Nowhere in *Union Gas* did this Court analyze the nature of response costs or the issue concerning whether response costs constitute equitable monetary relief or legal damages.

ES&G and the City apparently believe that because this Court used the term damages in *Union Gas*, response costs necessarily constitute legal damages. ES&G and the City do not distinguish between the term "damages" when used generically and the term "damages" when used in the insurance context (which Wisconsin has defined as legal damages). As the court in *Continental Insurance v. Northeastern Pharmaceutical* stated:

> Viewed outside the insurance context, the

> term "damages" is ambiguous: it is reasonably open to different constructions. Webster's New International Dictionary 571 (1971) defines "damages" as "the estimated reparation in money for detriment or injury sustained: compensation or satisfaction imposed by law for wrong or injury caused by a violation of a legal right." The dictionary definition does not distinguish between legal damages and equitable monetary relief. . . .
>
> In the insurance context, however, the term "damages" is not ambiguous, and the plain meaning of the term "damages" as used in the insurance context refers to legal damages and does not include equitable monetary relief.

Northeastern Pharmaceutical, 842 F.2d at 985.

Because *Union Gas* only involved the issue of immunity, there was no reason for the Court to determine whether response costs constituted legal damages or equitable monetary relief. Thus, *Union Gas* is not on point.

ES&G and the City fail to cite the only Supreme Court case on point, *Exxon Corp. v. Hunt*, 475 U.S. 355 (1986). This Court specifically stated in *Exxon Corp.* that response costs are designed to facilitate cleanup and prevent future releases, and are not designed to "compensate private parties for economic harms that result from discharges of hazardous substances." 475 U.S. at 359-60. This is precisely how the Wisconsin Supreme Court viewed response costs. (Pet. App. 137-38).

The Wisconsin Supreme Court decision is entirely consistent with decisions of this Court, CERCLA's statutory

scheme and administrative rules. There is no reason for the grant of certiorari.

III.

IMPOSING A NATIONAL UNIFORM RULE OBLITERATING INSURANCE CONTRACT TERMS AND SUPERSEDING STATE LAW PRINCIPLES OF INSURANCE CONTRACT INTERPRETATION IS DIRECTLY CONTRARY TO CERCLA AND FEDERAL COURT DECISIONS.

Finally, in an attempt to create a federal issue worthy of certiorari, ES&G and the City broadly assert, without authority, that this Court should impose a national uniform rule superseding state law principles governing insurance contract interpretation. (Pet. at 18). Under their approach, courts would be required to disregard all contract provisions and well-established state insurance law principles when the underlying claims involve CERCLA. Calls for such extreme measures have been squarely rejected by federal courts and CERCLA itself.

In *American Policyholder Insurance Company v. Nyacol Products, Inc.*, 989 F.2d 1256 (1st Cir. 1993), *cert. denied*, 114 S. Ct. 682 (1994), the court rejected the application of a uniform federal rule stating, "[w]e decline to heed that call in the face of solid precedent pointing in the opposite direction." 989 F.2d at 1263 (see also cases cited therein). In reaching its determination, the court further stated:

> Case law aside, we doubt that Congress intended CERCLA to be the springboard for catapulting federal courts into what has historically been a state-law preserve. Congress has made it plain that federal

> legislation should rarely be interpreted to encroach on a state's regulation of insurance. See, e.g., McCarran-Ferguson Act, 15 U.S.C. § 1010(b)(1988).

989 F.2d at 1263; *see also Hudson Ins. Co. v. Double D Management Co.*, 768 F. Supp. 1538, 1541-42 (M.D. Fl. 1991). This Court denied certiorari in *Nyacol Products* last year.

CERCLA itself recognizes the application of state law to resolve insurance issues. 42 U.S.C. § 9672(a) expressly states in pertinent part:

> Nothing in this subchapter shall be construed to affect either the tort law or the law governing the interpretation of insurance contracts of any State.

See also Nyacol Products, 989 F.2d at 1263. ("CERCLA's text not only envisions the bringing of suits under state law but specifically mandates their resolution in accordance with that law"); *Hudson Insurance Co.*, 768 F. Supp. 1538. (CERCLA specifically prohibits preemption of state insurance law).

Finally, the imposition of such a drastic measure would conflict with fundamental principles established by this Court in *Erie Railroad Co. v. Tompkins*. 304 U.S. 64, 74 (1938). In *Erie* this Court rejected the notion of a uniform rule of law in matters reserved to the states. *See also Ruhlin*, 304 U.S. 202; cases cited *supra* notes 5 and 6.

Because ES&G and the City's call for a national rule is prohibited by CERCLA and fundamental principles articulated by this Court, there is no reason to grant certiorari.

CONCLUSION

Based upon the foregoing, ES&G and the City's petition for a writ of certiorari should be denied.

Respectfully submitted,

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